No. 14-940

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In The

# Supreme Court of the United States

SUE EVENWEL, et al.,

*Appellants,*

v.

GREG ABBOTT, In His Official Capacity as Governor of Texas, et al.,

*Appellees.*

**On Appeal From The United States District Court For The Western District Of Texas**

## BRIEF OF HARRIS COUNTY, TEXAS, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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## QUESTION PRESENTED

Does the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws" require that states and local jurisdictions exclude children and resident immigrants from the apportionment base?

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## INTEREST OF *AMICUS CURIAE*[1]

Harris County, Texas, is the largest county in Texas with a population of approximately 4.44 million persons or about one in every six residents of the State of Texas.[2] The county's population exceeds that of 25 states and is roughly equivalent to the combined population of the six smallest states.[3] Harris County is an international community, welcoming its residents from more than 110 different countries.[4] It has proportionately a larger percentage of children and non-citizens than the state as a whole. As a result, a change in the model of representation from a population-based metric to one based on eligible voters – *i.e.*, one that excludes children and resident non-citizens – will result in a decrease of the county's representation in the state legislature along with an accompanying increase of representation for areas with lower populations.

Harris County, much like the framers of the United States Constitution in 1787 and the drafters

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[1] Rule 37 Statement: All parties filed with the Clerk blanket consents to the filing of *amicus* briefs. Additionally, this brief is authorized to be filed under Rule 37.4. No part of this brief was authored by any party's counsel, and no person or entity other than the *amicus* funded its preparation or submission.

[2] U.S. CENSUS BUREAU, AMERICAN FACT FINDER, 2014 Population Estimates.

[3] *Id.*

[4] U.S. CENSUS BUREAU, AMERICAN FACT FINDER, Table B05006 (2009-2013) (Harris County, Texas).

of the Fourteenth Amendment in 1866, believes that children and resident non-citizens should not be ignored when crafting a model of representation. While those under the age of eighteen are not yet permitted to vote, the resources we allocate to their education, healthcare, and safety will determine the community's future stability and prosperity. To the extent the county loses representation, which would be the effect of the appellants' legal theory, it is more likely that resources will be re-directed to less populous areas. Similarly, resident non-citizens, including both documented and undocumented immigrants, pay taxes and contribute to the economy. They are part of the population that uses roads, schools, infrastructure, and other services and facilities provided by the state and county. The rules and laws adopted by the state or the county apply to them just as they do to citizens. The county believes that the most effective model of representation is one that includes all the affected population and further believes that such a model conforms to the long-standing understanding of the scope of the Equal Protection Clause.

## SUMMARY OF ARGUMENT

Although the appellant,[5] Ms. Evenwel, asserts that the Equal Protection Clause mandates that

[5] There are two appellants. In this brief, we refer to them collectively by the name of the lead plaintiff, Ms. Evenwel.

children and resident non-citizens be excluded from the representation model and apportionment base for legislative districts, her claim derives no support from the text of the Constitution. Under her preferred representation model, state-senate districts, and presumably state-house and local-government districts, would be drawn without considering children, resident non-citizens, and others who are not eligible to vote, so that districts would be based solely on the number of eligible voters rather than population. The Equal Protection Clause, however, applies to "any person," a category that this Court has long held to encompass children and non-citizens.[6] Further, the Fourteenth Amendment requires that *citizens* not be denied the privileges and immunities of citizenship, while later in the same sentence it extends the guarantees of equal protection and due process to the broader category of *any person*. The drafters knew that words had different meanings and were precise in how they used them.

Unable to find a textual basis for her claim in the Constitution, Ms. Evenwel relies on language from this Court's one-person, one-vote cases, especially *Reynolds v. Sims*,[7] the first legislative-districting case decided under the Equal Protection Clause. In *Reynolds*, though, the Court required that districts

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[6] *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 210-15 (1982); *Application of Gault*, 387 U.S. 1, 13 (1967); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[7] 377 U.S. 533 (1964).

have equal population, not equal numbers of voters. The language in *Reynolds* does suggest that there may be circumstances where an apportionment on the basis of equal numbers of voters or a similar measure might be permissible, but it does not support a conclusion that an equal-voters metric is required.[8] Indeed, the Court in *Reynolds* could not have intended to require that voters, rather than population, be used as the apportionment standard. In mid-1964, when *Reynolds* was decided, it was well known to the Court and to the world that Alabama routinely, systematically, and effectively prevented African-Americans from registering to vote, especially in the majority-black rural counties. Had the *Reynolds* Court required voter-based apportionment, as Ms. Evenwel suggests, the effect would have been largely to remove African-Americans from the representation model. It is inconceivable this Court would have taken such a step.

Not only does *Reynolds* fail to support Ms. Evenwel's thesis, this Court's post-*Reynolds* cases also neither suggest nor compel the conclusion that voter-based apportionment is constitutionally required. In those cases, the Court typically determined whether a district was malapportioned under the one-person, one-vote standard by comparing the number of persons, not voters, in each district with the number of persons, not voters, in an ideally sized

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[8] *Reynolds*, 377 U.S. at 577.

district. While this Court has accepted a registered-voter metric in at least one case, it was also careful to make clear that the decision to include or exclude aliens and other groups involved choices about the nature of representation with which it had been shown no constitutionally founded reason to interfere.[9] Further, in that case the Court noted that it accepted a voter-based apportionment "only because . . . it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[10]

Finally, it is inconceivable that the drafters of the Fourteenth Amendment could have thought or understood that they were requiring a model of representation based on voters rather than population. When the drafters of the Fourteenth Amendment were considering the Amendment's section 1, which contains the Equal Protection Clause, they also were approving section 2's apportionment model for the House of Representatives. The basic issue in the section 2 debate was whether the apportionment and representation model should be voter-based or population-based. The contemporary record reflects that the members of the 39th Congress were well aware that a population-based model would include women, children, and non-citizens as part of the

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[9] *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

[10] *Id.* at 93.

apportionment base. They knew, for example, how many non-citizens would go into the apportionment formula and which states would gain or lose representation because of their inclusion. The issue was squarely presented in the Joint Committee on Reconstruction,[11] the Senate, and the House of Representatives. The Joint Committee expressly chose a population-based model over a citizen-based metric by a vote of 11-3. In both the House and Senate, motions were made to substitute a voter-based model for the population-based one that had come from the Joint Committee. In each case, the voter-based model urged today by Ms. Evenwel was rejected by a margin of 4.5 to 1.

We know from this history that there is no theory of voter-based apportionment enshrined in the Constitution, and we also know that the framers of the Fourteenth Amendment, who used the term "persons" in section 2 to signify that apportionment would be on the basis of population and not on the number of voters, could not have imagined that when they used the term, "any person," in section 1's Equal Protection Clause, it might be interpreted as requiring voter-based apportionment. Words have meaning, and the framers of the Fourteenth Amendment used them carefully. The interpretation Ms. Evenwel urges ignores both the carefully chosen words of the text of

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[11] The Joint Committee filled the role of the legislative committee for both the House and the Senate in reviewing the proposed Fourteenth Amendment.

the Fourteenth Amendment and the original understanding of what those words meant in terms of models of representation.

## ARGUMENT

### I. The claim that legislative seats must be apportioned on the basis of equal numbers of voters or potentially-eligible voters is not based on the text of the Constitution and finds no support in its language.

As Ms. Evenwel correctly notes, this case is governed by the Constitution, and more specifically the Equal Protection Clause, which provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] From that language, she concludes that the constitutional guarantee of equality in this context is limited not to "any person" but rather to eligible voters so that Texas state-senate districts – and by necessary implication, state-house districts and local-government single-member districts – must be drawn to contain equal numbers of eligible voters.[13] To be sure, she concedes that a jurisdiction may draw districts to be equal in total population, which would include, among others, children and resident non-citizens, but

[12] U.S. CONST., FOURTEENTH AMENDMENT, § 1; Brief for Appellants, at 1.

[13] *E.g.*, Brief for Appellants, at 19, 26, 28.

only if the equality of total population also produces equality of eligible voters.[14] Under the Evenwel theory, if districts are equal in total population that is a permissible serendipity, but equality in the number of eligible voters is the legal requirement. That supposed legal requirement, however, finds no support in the text of the Constitution but instead is fashioned from whole cloth.[15]

The Equal Protection Clause mandates equal treatment to any person, not to any eligible voter. Nor is it limited to citizens, who typically are the only persons who can qualify to vote. The drafters of the Fourteenth Amendment prohibited state laws that would deny privileges and immunities of citizenship to anyone who is a citizen of the United States, but later in that same sentence when they set out the guarantees of equal protection of the laws and of due process, the drafters expanded the covered class to include persons, whether citizens or not. Thus, when Ms. Evenwel argues that the Equal Protection Clause requires limiting the apportionment base and the theory of representation to eligible voters and denying children and resident non-citizens any consideration,

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[14] Brief for Appellants, at 28-29.

[15] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (judges cannot create rules out of whole cloth but must find some basis in the text of the Constitution); *see also*, *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) ("a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all").

the argument does not derive from the text of the Constitution and, in fact, is inconsistent with it. Indeed, this Court has long recognized that the Equal Protection Clause's use of the term "person" causes its guarantee to reach children[16] and resident non-citizens[17] – two groups that Ms. Evenwel argues are constitutionally required by the Fourteenth Amendment to be omitted from the representation model. Her position cannot be squared with either the text of the Constitution or with this Court's interpretation of the scope of the Equal Protection Clause.

## II. Ms. Evenwel's argument is logically flawed and is not supported by this Court's one-person, one-vote cases.

Lacking support in the text of the Equal Protection Clause or in this Court's cases construing that clause to encompass children and resident non-citizens, Ms. Evenwel bases her argument on this Court's one-person, one-vote cases, especially the early ones.[18] Specifically, she cites to *Baker v. Carr*,[19]

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[16] *Application of Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill or Rights is for adults alone").

[17] *Plyler v. Doe*, 457 U.S. 202, 210-15 (1982) (undocumented immigrant children protected by the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens").

[18] *See, e.g.*, Brief of Appellants, at 19-29.

[19] 369 U.S. 186 (1962).

*Gray v. Sanders*,[20] and *Westberry v. Sanders*[21] as the cases that led to *Reynolds v. Sims*,[22] the seminal state-legislative, one-person, one-vote case and asserts that "[t]he Court need not look beyond these seminal decisions to resolve the question."[23] Of these, *Reynolds* is the most relevant, since it is the only one that addresses the issue of whether the Equal Protection Clause permits disparately sized legislative districts. *Baker* was limited to the question of justiciability and did not reach the substantive issue of the constitutionality of differently sized districts. *Gray* involved an electoral-college-type system where the ultimate votes for Governor of Georgia were cast by counties. *Westberry* was a legislative districts case, but, as a challenge to congressional districts, it was governed by article I, § 2, of the Constitution, as amended by section 2 of the Fourteenth Amendment, rather than by the Equal Protection Clause. *Reynolds* was the first case to consider whether differently sized legislative districts violated the Equal Protection Clause and is the one on which Ms. Evenwel and we rightly focus.

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[20] 372 U.S. 386 (1963).

[21] 376 U.S. 1 (1964).

[22] 377 U.S. 533 (1964).

[23] Brief of Appellants, at 14.

### A. The three points Ms. Evenwel claims compel the conclusion that districts must have equal numbers of voters rather than population are not supported by the cases and do not lead to that conclusion.

Relying on *Reynolds* and its predecessors, *Baker, Gray*, and *Westberry*, Ms. Evenwel, in the focal point of her brief pronounces that "[t]ogether, these cases compel the conclusion that the 'population' that must be equalized for purposes of the one-person, one-vote rule is the number of eligible voters in the geographic area from which districts are to be apportioned."[24] In the rest of that paragraph, Ms. Evenwel sets out the three-step logical progression that she believes compels that conclusion.[25] Such a conclusion, though, is not compelled, logical, or reasonable.

The first point in her argument is that these cases all rely on the plaintiffs' status as eligible voters as the foundation for Article III standing. It is certainly correct that the plaintiffs in each of the four cases were registered voters. The Court discussed their standing as voters because that was the way the case was presented, and those were the facts before the Court. Very likely the plaintiffs' attorneys made sure that the plaintiffs were registered voters in order to present the strongest case for standing.

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[24] *Id.* at 26.

[25] *Id.*

The Court's discussion of the status of the plaintiffs who were before it and of the rights they asserted does not, however, require the conclusion that the only interests protected by the Constitution are those of the particular plaintiffs who brought those four cases. The limited issue presented in those four cases does not foreclose the possibility that children and non-citizens also have representation rights.

The second step leading to Ms. Evenwel's conclusion is that the injury in those cases was the denial of the right to an equally weighted vote. While the Court did discuss the right to an equally weighted vote, neither the Court nor Ms. Evenwel define how a vote's weight is to be determined. If it means that each voter in one district should have an equal ability to affect the outcome of an election as a voter in other districts, then equality would have to be based on turnout rather than the number of registered or potentially eligible voters. For example, if two districts have equal numbers of registered voters, but District A's voters turn out at twice the rate of District B's, then, under that theory, the votes cast in District B would have twice the weight as those in District A. On the other hand, an equally weighted vote could mean that each voter, no matter the district where he or she resided, would be casting a vote for the same thing – in this case, for a state senator

who represents roughly 811,000 persons or 1/31 of the state's population.[26]

The third step and final reason that Ms Evenwel says compels the conclusion that eligible voters constitute the relevant measure is her understanding that "in each case the Court remedied that constitutional violation by requiring the State to apportion districts in a fashion that ensured equal voting power."[27] It is not correct, however, that the remedies in the four cases involved equal numbers of voters rather than equal numbers of people. Because *Baker* considered only the justiciability issue, it did not address a remedy. *Gray*, which related to the election of Georgia's governor, required a state-wide election, which necessarily includes both all the population as well as all the voters. Thus, it is impossible to draw any conclusion regarding the population-based metric versus a voter-based measure. *Westberry*, which was decided under article I rather than the Equal Protection Clause, speaks of the constitutional objective of "making equal representation for equal numbers of people the fundamental goal for the House of Representatives."[28] The Court never said that districts must

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[26] *See, e.g.*, *Westberry*, 376 U.S. at 2-3 (describing the plaintiffs' claim that unequal total population among districts deprived them of an equally weighted vote, and posing the issue in terms of members of Congress representing two or three times as many people as members from other districts).

[27] Brief of Appellants, at 26.

[28] *Westberry*, 376 U.S. at 47.

be constructed to contain equal numbers of voters, and, given the specific population-based language relating to congressional apportionment, it is doubtful that it would.

This brings us to *Reynolds*, the last of the four cases Ms. Evenwel claims "compels" the conclusion that an equal number of eligible voters is the metric. Indeed, *Reynolds* is by far the most relevant case, since it is the first case to find a one-person, one-vote requirement for legislative districts to be required under the Equal Protection Clause. Yet, *Reynolds* cannot be read as requiring that districts be drawn with equal numbers of voters. First, this Court's express language in *Reynolds* was, "[w]e hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[29] Later in its opinion, the Court said:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an

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[29] *Reynolds*, 377 U.S. at 568.

identical number of residents, or citizens, or voters.[30]

While one might conclude from the final sentence in the quoted passage that the Court recognized that voters might be a *permissible* apportionment base, the language of the Court does not countenance the Evenwel conclusion that the case *mandates* districts with an equal number of voters. By specifically listing apportionment designed to produce an equal number of residents, the Court, at the very minimum, anticipated that total population was a permissible apportionment metric.

### B. The 1964 *Reynolds* Court could not have intended to mandate voter-based apportionment, since doing so would have had the effect of virtually eliminating African-Americans from the representation formula.

An even more conclusive indication that the *Reynolds* Court did not intend to impose a voter-based apportionment is the fact that such a system would have had the effect of largely ignoring the representation rights of the African-American population. *Reynolds* challenged the differing sizes of Alabama's state house and senate districts. The opinion was issued on June 15, 1964, at a time when the nation was well aware of the disenfranchisement of

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[30] *Reynolds*, 377 U.S. at 577.

African-Americans in Alabama, Mississippi, and other states in the deep South. While the Court, like all well-informed Americans who followed the extensive news coverage,[31] would have known of Alabama's efforts to prevent African-Americans from registering to vote, it also would have been aware of that policy from at least one case it decided less than two years earlier. In October 1962 the Court granted certiorari and issued a summary, *per curiam* opinion affirming the authority of federal judges to order Alabama officials to register African-Americans whose applications to vote had been denied.[32] That case involved Macon County, which included Tuskegee and where 83 percent of the county's population was African-American.[33] The record reflected that the voter registration process required an in-person interview, and

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[31] *E.g.*, E.W. Kenworthy, *Civil Rights Forces Assail Denial of Vote to Negro*, NEW YORK TIMES, Apr. 2, 1964, at 1 (discussing Senate debate on Civil Rights bill); Claude Sitton, *Negro Queue in Mississippi is Symbol of Frustration in Voter Registration Drive*, NEW YORK TIMES, March 2, 1964, at 20 (noting in Madison County, 72 percent of the residents are black, but African-American voter registration is only 1.1 percent, while white voter registration is 97 percent and how of approximately 1,000 African-American applicants in the voter registration drive, only 30 were successfully registered); *Negro Gain Slow in Winning Vote*, NEW YORK TIMES, Nov. 24, 1963, at 18 (noting that in rural areas where blacks often outnumber whites, African-Americans have little voting strength and using Dallas County (Selma), Alabama, as an example).

[32] *State of Alabama v. United States*, 371 U.S. 37 (1962) (*per curiam*).

[33] *State of Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

the registrars opened the office for those interviews only infrequently.[34] Whites were considered first without regard to when they put their name on the list, so that white applicants were all processed and routinely registered, while very few African-American applications were even processed. In fact, the record reflected if the registrars proceeded at the then-current rate of permitting only about eighteen African-American applicants to reach the registration desk in a year, it would take more than twenty years simply to interview those on the existing waiting list.[35] Even if African-American applicants were able to reach the application desk, they still had to take a writing test. Although the Alabama Constitution prohibited helping any applicant, registrars routinely and repeatedly assisted whites who were always approved, while they gave no assistance to African-American candidates who were rejected for trivial, if not phantom, mistakes.[36] The African-American candidates who were rejected for errors in the writing test included many with undergraduate and post-graduate degrees.[37] Ironically, Macon County, which was the subject of *State of Alabama v. United States*, may have had one of the better African-American voter registration records among the state's majority-black rural counties. In that 83-percent-African-American county, about a third of the registered

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[34] *Id.* at 587 and n.12.

[35] *Id.* at 587.

[36] *Id.* at 587-88.

[37] *Id.* at 588.

voters were African-American.[38] By comparison, Dallas County, where Selma is located, had a non-white voting-age population of 15,115 in 1964, but only 320 non-white registered voters.[39] Neighboring Lowdes County with a non-white voting-age population of 5,122 had no non-white registered voters in 1964.[40] Wilcox County with a non-white voting-age population of 6,085, also had not a single African-American registered voter.[41]

While the *Reynolds* Court may not have been familiar with the registration statistics in each of the Alabama counties, it was well aware from the record in a case that had recently come before it of the extensive disenfranchisement of African-Americans in Macon County, Alabama. Like anyone who read the newspaper or watched the television news at that time, the members of the Court would have been well aware that Macon County was not an aberration and that disenfranchisement of African-Americans in Alabama, particularly in the rural, majority-black areas, was systematic and extremely effective. It is simply not conceivable that the Court would have mandated a voter-based apportionment system that

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[38] *United States v. State of Alabama*, 192 F. Supp. 677, 687 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

[39] U.S. COMM'N ON CIVIL RIGHTS, *The Voting Rights Act: The First Months*, 1965, at 37.

[40] *Id.*

[41] *Id.*

would have had the effect of leaving disenfranchised African-Americans out of the apportionment formula.

### C. This Court's post-*Reynolds* apportionment decisions do not compel or even suggest that voter-based, rather than population-based, districting is required.

The holding in *Reynolds* requires only that "a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[42] To that end, both in *Reynolds* and the apportionment decisions that followed, this Court analyzed substantial equality – and therefore the constitutional sufficiency – of apportioned districts on the basis of total population with no accompanying analysis of voter population.[43] In determining the adequacy of a particular apportionment, the Court has long measured deviations of the resulting districts from the numerical

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[42] *Brown v. Thomson*, 462 U.S. 835, 842 (1983), citing *Reynolds*, 377 U.S. at 577.

[43] *See, e.g.*, *Reynolds*, 377 U.S. at 540-41; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 664-66 (1964); *Swann v. Adams*, 385 U.S. 440, 442 (1967); *Avery v. Midland County, Tex.*, 390 U.S. 474, 476 (1968); *Abate v. Mundt*, 403 U.S. 182, 184 (1971); *Gaffney v. Cummings*, 412 U.S. 735, 737 (1973); *Mahan v. Howell*, 410 U.S. 315, 318-19 (1973); *Connor v. Finch*, 431 U.S. 407, 416 (1977); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 700 n.7 (1989).

ideal.[44] The Court arrives at the ideal district size, by dividing the total population, not the number of voters, by the number of districts. Thus, in those situations in which the Court has found that a particular apportionment scheme violates the Equal Protection Clause, it has generally done so when the scheme resulted in districts with meaningful deviations from the ideal district size as determined by total population, not eligible voters.

For example, not long after *Reynolds*, this Court decided *Swann v. Adams*, in which the Court evaluated the adequacy of apportionment of state legislative districts in terms of total population per elected official and found malapportionment on that basis rather than voter population.[45] Similarly, in *Avery v. Midland County*, the Court considered whether four county commissioner districts with total populations of 67,906, 852, 414, and 828, respectively, violated the Fourteenth Amendment.[46] *Avery* held that they did, and suggested no intent that districts needed to be reapportioned by eligible voters.[47] Rather, *Avery* simply directed that county commissioner seats not

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[44] *See, e.g., Board of Estimate of City of New York*, 489 U.S. at 700 n.7 (identifying the formula used by this court "without exception since 1971").

[45] *Swann*, 385 U.S. at 444-45.

[46] *Avery*, 390 U.S. at 476.

[47] *Id.* at 484-85.

be apportioned among single-member districts of substantially unequal population.[48]

In a slight variation, *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, addressed an electoral system for junior college trustees in which districts were apportioned based on "school enumeration," defined as the number of persons between the age of 6 and 20 years who reside in the district.[49] This system is the antithesis of an "equal voter" system as it apportions trustees based on the number of a specific subset of the population, most of whom are unable to vote. Notably, though, *Hadley* did not take issue with the use of school enumeration as a population basis for apportionment.[50] Rather, the Court found the state-law apportionment formula unconstitutional because it did not apportion trustees in equal proportion to the school enumeration in the more populous districts and therefore contained a "built-in bias."[51]

These examples are emblematic of the Court's use of total population in measuring compliance with the principles announced in *Reynolds*. Thus, while

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[48] *Id.* at 485-86.

[49] *Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 51 (1970).

[50] *Id.* at 57 and n.9 (The Court recognized there was a question whether school enumeration figures, rather than actual population, were a permissible basis for apportionment but found no need to address the issue).

[51] *Id.*

this Court has reluctantly accepted other metrics, such as the number of registered voters, when they closely resemble population, neither *Reynolds* nor its progeny support the conclusion that Texas's apportionment based on total population is constitutionally unsound.[52] Rather, as this Court has explained, the decision of whether to include "aliens, transients, short-term or temporary residents, or persons denied the vote for convictions of a crime" in an apportionment base is a political question involving the nature of representation and therefore reserved to the states.[53] As such, Evenwel's conclusion that either *Reynolds* or the cases applying it compel equalization of voter population is without foundation in those precedents.

## III. The original understanding of the Equal Protection Clause did not extend to voter-based apportionment.

### A. The framers of the Fourteenth Amendment did not understand voter-based apportionment either to be a constitutional principle or to be the established standard for determining representation.

At the same time the 39th Congress was drafting the language of the Equal Protection Clause, it was

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[52] *Burns v. Richardson*, 384 U.S. 73, 93 (1966).

[53] *Id.* at 92; *see also*, *Reynolds*, 377 U.S. at 586 ("Legislative reapportionment is primarily a matter for legislative consideration and determination.").

also approving an apportionment standard that was based on total population and that included children and non-citizens in the apportionment base for congressional seats. Both the Equal Protection Clause, which is found in section 1 of the Fourteenth Amendment, and the apportionment formula in section 2 were presented to the states and approved by them as part of the proposed Fourteenth Amendment.

While Ms. Evenwel dismisses the relevance of the framers' adoption of a congressional apportionment model that includes children and resident non-citizens as the "so-called federal analogy," she misses the point. This *amicus* does not suggest that section 2 of the Fourteenth Amendment applies to state legislative districts either directly or by analogy to the federal system. What it does suggest is that the consideration and adoption of section 2 establishes (1) there is no principle of voter-based apportionment enshrined in the Constitution and (2) one cannot legitimately suggest that the framers of the Equal Protection Clause in section 1 of the Fourteenth Amendment had any understanding that in doing so they were mandating a system of representation based on voters or potentially eligible voters rather than on population, since they had, at the same time and by using the same language – *i.e.*, defining the covered class by using the word "persons" – adopted a system based on total population as the apportionment metric and expressly rejected one based on potentially eligible voters. Section 2, by its terms, does not command the states to adopt a total-population measure as the apportionment standard

for state legislative districts, but it does strongly suggest that the framers had no understanding or intent that voters or potentially-eligible voters would be the required measure.

### 1. Section 2 of the Fourteenth Amendment was drafted in the context of shifting political power resulting from the end of the Civil War and the emancipation of the slaves as well as the differing ratio of voters to population among the loyal states.

The Fourteenth Amendment, which was drafted by the Congress and approved for submission to the states in 1866, included a collection of measures that dealt with the aftermath of the Civil War and the reentry of the seceded states. As finally approved, it had evolved to a measure that established the citizenship status of the recently-freed slaves, provided federal protection to them; reworked the apportionment formula for the House of Representatives in light of the now-meaningless three-fifths clause in article I, section 2; defined the political rights of the former Confederates; and repudiated the Confederate debt. At the time the proposals that eventually would become the Fourteenth Amendment were introduced, the Thirteenth Amendment freeing the slaves had been ratified and was part of the Constitution, but consideration and ratification of the Fifteenth

Amendment enfranchising the former slaves lay three and four years in the future.

Thus, when the Fourteenth Amendment was drafted and ratified, the slaves had been freed but had not been enfranchised, and there appeared to be little immediate likelihood that the formerly-seceded states would extend the franchise to blacks. Under the apportionment formula in article I, section 2, of the Constitution, the number of congressional seats assigned to the former slave states would increase because the newly-freed slaves, approximately four million in number,[54] now would be counted as whole persons rather than as three-fifths of a person. As a result, when the representatives of the seceding states were readmitted to the Congress, the loyal states, which were victorious in the bloody and costly Civil War, would see their political power diminished, while the political power of the vanquished southern states in the House of Representatives would be increased. This was acceptable to the ascendant Republicans, who then held strong majorities in the Congress, only if the freedmen could vote. That result both would reflect their policy goal of ensuring the freed slaves had legal and political equality with whites and would provide the Republicans an opportunity to make electoral inroads in the south as they anticipated the newly freed slaves would vote for the

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[54] U.S. DEPT. OF THE INTERIOR, 1860 CENSUS OF POPULATION, at *vii* (1864); *Congressional Globe*, 39th Cong., 1st Sess., at 403 (Jan. 24, 1866).

party associated with emancipation.[55] Thus, one of the factors driving the ultimate form of section 2 was the need to tie the southern states' representation to the enfranchisement of the freedmen.

The other major issue affecting the ultimate form of the apportionment formula was the differing effect voter-based formulas and population-based formulas would have on different sections of the country. In particular, a shift from an apportionment system based on total population – as was included in the 1787 Constitution minus, of course, the fractional representation of slaves – to a voter-based standard would have reduced New England's representation at the expense of the western states.[56] Finding a formulation that addressed these two issues – both political and sectional – led to the final version of section 2.

### 2. The House was presented with both voter-based and population-based apportionment options.

Proposals to amend the Constitution to address the now-archaic three-fifths clause were introduced

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[55] JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997) at *xiii-xiv*, 28. Judge Sneed's book appears to be privately published. The Library of Congress Catalog Card Number is 97-090651. *Also see*, HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 99 (The Johns Hopkins Press, 1908).

[56] Flack, at 102.

as early as the second and third days of the 39th Congress.[57] Both of these proposals used voters, not population, as the apportionment base. That simple formulation accomplished the primary goal of the Republican majority as it provided additional representation to the South resulting from counting the former slaves, but it did so only if the freedmen were enfranchised. About a month later, though, Maine congressman James Blaine spoke to urge the use of population rather than voters as the apportionment base. While he recognized and concurred in the rationale for using voters as the apportionment base – *i.e.*, "to deprive the lately rebellious States of the unfair advantage of a large representation in the House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States" – he believed the disadvantages or, as he called them, the "evils" of using voters as the metric would abide long after the goal of enfranchisement of the former slaves had been realized.[58] He claimed that "population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot."[59] He also noted that "[t]he ratio of voters to population differs very widely in different sections, varying in the [nineteen free States] from a

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[57] *Globe*, at 9, 10 (Dec. 5, 1865).

[58] *Id.* at 141 (Jan. 8, 1866).

[59] *Id.*

minimum of *nineteen per cent* to a maximum of *fifty-eight per cent.*"[60] This would result in states' existing level of representation falling if they had a low ratio of voters to population while states with a high ratio would gain congressional seats.[61] Using the population metric retained the standard used in the original version of the Constitution, minus the now-meaningless three-fifths clause. To accomplish the goal of denying increased representation to the former slave states so long as they withheld the ballot from the freedmen, Blaine proposed deleting the number of persons who were denied political rights or privileges on the basis of race or color from the apportionment base.[62] In other words, if the southern states denied the franchise to the freedmen, they would lose congressional seats.

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[60] *Id.* (emphasis in original). The disparities Blaine identified in 1866 between using a population metric and a voter metric is several times greater than the ones complained of by Ms. Evenwel in the present day. The magnitude of the difference can be seen in his example of California and Vermont, which had roughly equal populations and three congressional seats each under the existing population-based apportionment. If a voter-based apportionment were used, though, post-Gold-Rush California, which had relatively few women and children, would be entitled to eight seats compared to equally populated Vermont's three. *Id.*

[61] *Id.*

[62] *Id.* at 142.

### (a) The Joint Committee rejected the voter-based option and recommended passage of a population-based model.

Thus, with Blaine's January 8 proposal the issue was defined as being whether the apportionment metric should be voters or people. That issue was considered the next day by the Joint Committee on Reconstruction, a committee of nine representatives and six senators charged with considering matters relating to reconstruction and the admission of the senators and representatives from the states of the former confederacy. The committee's first order of business, other than organization matters, was consideration of a proposed constitutional amendment submitted by Pennsylvania's Thaddeus Stevens that would base apportionment on the number of legal voters in each state.[63] Four members of the committee offered substitutes for Stevens's voter-based metric. Two of the substitutes used a population metric, while the other two apportioned on the basis of citizens.[64] Faced with five competing formulations based variously on voters, citizens, or population, the committee took a test vote on the question of whether apportionment should be based on the number of voters. By a 6-8 vote, voter-based apportionment was

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[63] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1866-1867, New York (1914), at 41.

[64] Kendrick, at 43-44.

rejected, and the committee referred the apportionment issue to a subcommittee.[65]

The subcommittee gave the committee two alternatives, both of which based apportionment on the number of citizens. The committee chose one of the two to work with, and Rep. Conkling of New York moved to substitute "persons in each State, excluding Indians not taxed," to replace the reference to citizens. Conkling's amendment providing for population-based, rather than citizen-based, apportionment was adopted by a vote of 11-3, and subsequently the amended version was approved by a vote of 13-1 to be recommended to the two houses of the Congress. Thus, the committee, by formal votes, rejected voter-based apportionment, rejected citizen-based apportionment, and approved population-based apportionment to recommend to the House and Senate. It is important to note that, at this time and for roughly the next three months, the proposed constitutional amendment was limited to congressional apportionment – what is now found in section 2 of the Fourteenth Amendment. The full body of what is now the Fourteenth Amendment did not emerge until later in the process.

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[65] Kendrick, at 45-46.

### (b) The House debated the merits of both apportionment models and rejected the voter-based model while approving the population-based model.

Rep. Stevens reported the committee draft to the whole House of Representatives, and an extensive debate ensued.[66] The debate included tables and discussion showing how individual states would gain or lose representation with each of the different proposals.[67] Rep. Conkling argued that systems based on voters or male citizens over the age of 18 would exclude four-fifths of the population – *e.g.*, women and children – from representation even though they have been part of the apportionment formula since the adoption of the Constitution.[68] He also noted that "the number of aliens in some States is very large, and growing larger" and "many of the large States now hold their representation in part by reason of their aliens."[69] On the other hand, Ohio's Rep. Lawrence, a proponent of voter-based apportionment, argued that the committee proposal perpetuates a "political evil" by giving representation to women, children, and unnaturalized foreigners, all declared

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[66] *Globe*, at 351 (Jan. 22, 1866).

[67] *E.g.*, *id.* at 357.

[68] *Id.* at 358.

[69] *Id.* at 359.

by the laws of the State unsafe or unnecessary depositaries of political power."[70]

Some of the debate touched on the apportionment of taxes as well as congressional seats, since the 1787 Constitution, as well as the proposed amendment, included both congressional seats and direct taxes in the same clause and apportioned them in the same way. During the week of the House debate, the proposal was referred back to the committee. As direct taxes had only infrequently been levied, the committee deleted that reference, which resulted in the issue that was finally presented to the House being solely one of congressional apportionment.[71] On January 31, the House voted on a substitute to the committee's recommended population-based model. The substitute would have apportioned seats "according to the number of male citizens of the United States over twenty-one years of age having the qualifications requisite of the electors of the most numerous branch of the State Legislature" – *i.e.*, – a voter-based model.[72] The motion to substitute was defeated by a vote

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[70] *Id.* at 404 (Jan. 24, 1866), *see also* p. 405 (arguing against including women, children, and aliens in the apportionment base); p. 537 (Jan. 31, 1866) (Rep. Stevens noting that as many as 15-20 congressional seats in the northern states are founded upon non-citizens).

[71] Kendrick, at 58, 201; George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WESTERN POL. Q. 829, 841-42 (1970); *Globe*, at 493-94 (Jan. 30, 1866).

[72] *Id.* at 535 (Jan. 31, 1866).

of 29-131, and the committee's proposed population-based model was adopted 120-46.[73] Thus, the House expressly rejected voter-based apportionment and approved population-based apportionment, both by overwhelming margins.

### 3. The Senate failed to achieve a two-thirds majority.

The joint resolution was debated intermittently in the Senate for about a month. Early in the debate, Senator William Fessenden of Maine, the Senate sponsor and Senate chair of the Joint Committee explained the objection to basing apportionment on voters rather than on population. He claimed that the "principle of the Constitution, with regard to representation is that it shall be founded on population."[74] Even though the franchise was limited at that time to males over the age of twenty-one, representation extended to persons of all ages, both male and female.[75] He stressed the inequality that resulted from the uneven distribution of voters among the states, and noted that the large number of foreigners in the states along the Pacific coast would be denied representation if apportionment were based on voters rather than population.[76] Later in the debate, Sen.

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[73] *Id.* at 538.

[74] *Globe*, at 705 (Feb. 7, 1866).

[75] *Id.*

[76] *Id.*

Wilson of Massachusetts, a supporter of the resolution, noted how there were 3,856,628 unnaturalized persons of foreign birth in the loyal states and only 233,651 in the rebel states, so that changing the apportionment base to voters or citizens would cost Massachusetts, New York, Pennsylvania, and Ohio, among others, seats in the House of Representatives.[77] The impact of the different options was clearly presented, and the senators knew that a population model would include noncitizens, women, and children and that their inclusion or exclusion would have a varying effect from state to state.

When the matter first came to a Senate vote, though, the question of the apportionment model was not the overriding issue. Senator Charles Sumner of Massachusetts and his followers opposed the proposal because they wanted it to guarantee civil and political rights – *i.e.*, suffrage – to the freedmen.[78] Sumner, who led a hard-core group of about seven senators, was determined not to vote for the proposed constitutional amendment unless it extended the vote to the freedmen.[79] There was not, though, a majority in 1866 for congressional action extending the vote to blacks.[80] Thus, the proponents of the amendment faced opposition from those who believed the measure was too

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[77] *Id.* at 1256 (March 8, 1866).

[78] *Id.* at 1287 (March 9, 1866).

[79] Robert Dale Owen, *Political Results from the Varioloid*, 35 ATLANTIC MONTHLY 660, 665 (June 1875).

[80] *Id.* at 663, 666; Sneed, at 146 n.421, 325.

harsh to the south and also from those, led by Senator Sumner, who felt it was not harsh enough.[81] As a result, then, there was not a two-thirds majority at that time.[82] After the vote on the measure received a majority but less than two-thirds, the matter went back to the Joint Committee, where it stayed for approximately two months.

### 4. A more comprehensive constitutional amendment emerged from the Joint Committee, but the requirement of population-based apportionment remained intact.

On April 28, 1866, the Joint Committee reported a new and expanded version of the proposed Fourteenth Amendment. What had originally been limited to the apportionment issue (essentially what is now found at section 2 of the Fourteenth Amendment) now was a much more comprehensive measure consisting of five sections including the Due Process and Equal Protection Clauses, provisions to temporarily disenfranchise persons who had voluntarily participated in the late insurrection, a prohibition on payment of the Confederate debt, and a section giving Congress the power to enforce the Amendment. There was some

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[81] *Globe*, at 1281 (March 9, 1866).

[82] *Id.* at 1277 (noting that the whip-count showed the absence of the necessary votes); 1289 (showing a vote of 25-22 in favor of the joint resolution, which was less than the two-thirds required) (March 9, 1866).

tinkering with the language relating to not counting the freedmen in the apportionment formula if the southern states denied them the vote on the basis of race or color, but the language providing for population-based, rather than voter-based, apportionment was unchanged.

The House debated the revised proposal, and, as might be expected, the discussion focused on the new provisions and not the apportionment formula, which had previously been discussed. The House passed the measure by a vote of 128-37 on May 10 and sent the proposal to the Senate.[83]

### 5. The Senate, as the House had done earlier, overwhelmingly rejected voter-based apportionment and adopted a population-based system.

Unlike the House, the Senate had not previously taken a direct vote on the issue of whether apportionment should be by a population-based or a voter-based metric. During the debate, senators, both those supporting and those opposing the measure, made it clear that a population-based model would count women, children, and aliens in the apportionment base even though they were not entitled to vote.[84]

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[83] *Id.* at 2545 (May 10, 1866).

[84] *E.g.*, *id.* at 2962 (June 5, 1866) (Sen. Poland (Vermont) noting the unfairness of a voter-based system giving greater weight to the new states, such as Nevada and Colorado, which

(Continued on following page)

They discussed the number of non-citizens who would be left out of the apportionment base if a voter-based model were used.[85] The senators also heard how different states would gain or lose representation depending on whether a population-based or voter-based model were used.[86] In short, the senators were well aware that a population-based model included, among others, non-voting women, children, and aliens in the apportionment base.

Wisconsin's Sen. Doolittle offered two motions to substitute language that would replace the Joint Committee's population-based metric with one based on voters.[87] Both were rejected by a vote of 7-31.[88] The

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had an abundance of males as compared to Massachusetts or New York); 2986 (June 6, 1866) (Sen. Sherman (Ohio) arguing that a voter in Massachusetts with a preponderance of women and a voter in New York City with a large element of unnaturalized foreigners would count more than a voter anywhere else); 3027 (June 8, 1866) (Sen. Johnson (Maryland) complaining that aliens, women, minors, and persons who had participated in the rebellion would count in the apportionment base).

[85] *Id.* at 2944 (June 4, 1866) (Sen. Williams (Oregon) noting that the voter-based model would eliminate 400,000 unnaturalized foreigners from being counted when congressional seats are apportioned to the State of New York); 2986 (June 6, 1866) (Sen. Wilson (Massachusetts) characterizing the proposal to adopt a voter-based model as one "to strike from the basis of representation two million one hundred thousand unnaturalized foreigners in the old free States").

[86] *E.g.*, *id.* at 2943 (1866) (Sen. Doolittle (Wisconsin) explaining which states would lose and which would gain representation under a voter-based model).

[87] *Id.* at 2986 (June 6, 1866).

joint resolution proposing the amendment was then passed by the Senate on June 8 by a vote of 33-11,[89] the House concurred in the Senate amendments on June 13 by a vote of 120 to 32,[90] and the proposed amendment was submitted to the states.

### B. The history of the consideration of the Fourteenth Amendment reveals that the drafters were well aware of the effects of both voter-based and population-based systems of apportionment and that they expressly and overwhelmingly rejected the voter-based metric in favor of apportionment on the basis of population.

The importance of the legislative history of the passage of the Fourteenth Amendment is not to suggest that some representative or senator's comments give us insight into how it should be interpreted. Instead, it shows what was before the members of the Congress when they voted and makes clear that they understood the difference between the voter-based and the population-based models. They knew that if they adopted a population-based model, women, children, and unnaturalized foreign-born residents would be counted. And they knew what

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[88] *Id.* at 2986, 2991 (June 6, 1866).

[89] *Id.* at 3042 (June 8, 1866).

[90] *Id.* 3149 (June 13, 1866).

impact that would have on their state and on all the others. The history of the drafters' attempts to substitute one word or phrase for another reveals their keen awareness that words have meaning and that the words they adopted for the final text were chosen with care. The drafters knew that "citizens" defined a narrower class than "person" and that phrases designed to encompass eligible voters (*e.g.*, "male citizens of the United States over twenty-one years of age") were narrower still. They chose to write section 2 as they did because they knew that by choosing the word, persons, they were requiring a representation system based on population rather than voters.

An examination of the legislative process reveals that the issue of whether to adopt a voter-based system or a population-based system was squarely presented in the Joint Committee, in the House, and in the Senate. The voter-based system was rejected in the Joint Committee on a vote of 6-8, which was the only vote in the process that was remotely close. The Committee later considered a citizen-based model, which would have excluded aliens, but voted to substitute a population-based model by a vote of 11-3. In the House, the motion to substitute a voter-based model for the one based on population failed 29-131, and in the Senate failed by a vote of 7-31 – in both cases a margin of about 4.5 to 1. The voter-based model was directly, repeatedly, and overwhelmingly rejected.

Looking to the clear language of the Fourteenth Amendment, as well as to the history of its enactment, there is simply no provision in the Constitution for voter-based apportionment. The only place apportionment is addressed applies to congressional apportionment and mandates population-based apportionment. There is no provision in the text for the voter-based apportionment Ms. Evenwel claims is constitutionally mandated. Further, when the drafters of section 2 of the Fourteenth Amendment wanted to impose a population-based apportionment system, which they understood to include children and non-citizens, as well as others (*e.g.*, women who at that time were not permitted to vote), they drafted the provision to say that "the whole number of *persons*" would be counted. It is difficult to understand Ms. Evenwel's claim that in section 1 – in fact, in the immediately preceding sentence of the Fourteenth Amendment – those same drafters used the phrase "*any person*" in the Equal Protection Clause to mean only certain persons and, specifically, to require that children and resident non-citizens be excluded from section 1 protections. Indeed, this Court has previously looked to the language of section 2 of the Fourteenth Amendment for insight into what the drafters meant in section 1's Equal Protection Clause.[91] Here, by using the same word – *i.e.*, person – in both sections, it is reasonable to conclude they understood

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[91] *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

that word to have the same meaning in section 1 as in section 2.

Neither the text of the Fourteenth Amendment nor the original understanding of the language used support Ms. Evenwel's claim.

## CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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